Codes of Conduct in Subcontracting Networks: A Labour Law Perspective

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ABSTRACT
In the past ten years, many European companies organised into subcontracting networks have decided to adopt codes of conduct to regulate labour relations and to ensure the respect of fundamental social rights. This paper first determines the context and the issues to be addressed by codes of conduct within networks of companies, and second analyses the terms under which they can be implemented. The paper argues that codes of conduct can complement the standards developed by States, the European Union or the social partners, but that steps should be taken in order to avoid that these texts replace the existing labour law.

KEY WORDS
Codes of conduct, corporate social responsibility, fundamental social rights, networks of companies, participation, stakeholder.

In the past 10 years, many European companies organised into subcontracting networks have decided to adopt codes of conduct to regulate labour relations. Corporate codes can concern many aspects of corporate socially responsibility, the importance of which was recently emphasized by the European Commission's Green Paper, published in July 2001 (European Commission, 2001). This paper, concentrates on codes which concern working conditions and especially, fundamental social rights, such as the prohibition of child labour, the principle of nondiscrimination, and the freedom of association.

Clearly, codes of conduct governing labour relations within companies are nothing new, as certain professional or international organizations (OECD, 1976; ILO, 1977) have long since adopted texts defining rules of corporate conduct. However, since the early 90s, not only has there been increased recourse to codes of conduct, but also a profound change in the nature of these texts, which justifies us referring to a "new generation of codes of conduct".

The first change in codes of conduct involves the broadening of their scope of application. Whereas codes of conduct in the 70s contained obligations benefiting the employees of a company and possibly of its subsidiaries, current codes most often apply to all workers in the network of companies, including subcontractors, franchisees and other economic partners. Accordingly, these texts are re-establishing the link between economic power, of the network's hub company, and its social responsibility for the activities of all companies in the network. This represents significant progress with respect to the labour law that prevails in the European Union countries, in that the latter conversely advocates the principle of legal independence of each member company in the network, and refuses to recognise the hub company's legal liability for the economic decisions it makes.

The second change to codes of conduct involves their drafting. Currently, codes of conduct are no longer written solely by international organisations or other public authorities, but mostly by private actors, such as companies. but also NGOs. This privatisation of labour standards within companies presents risks, inso far as it could lead to a weakening of workers' rights. One should note that labour relations are

characterized by economic inequality which labour laws in the European Union countries has managed to compensate with a set of social benefits, either contained in State law or in collective agreements negotiated by the social partners. There is reason to fear that private standards, particularly if drafted unilaterally by the company without the participation of workers' representatives, would not permit such social compensation for economic inequality, or would even exacerbate the latter.

These two changes, i.e. to the scope of application and the drafting of codes of conduct within networks of companies, highlight the two main issues brought to light by this new model of regulating labour relations within European companies, and which this paper attempts to address. It is necessary to determine first, the context and the issues to be addressed by codes of conduct within networks of companies (1) and second, the terms under which they can be implemented (2).

1. Issues and context of codes of conduct within networks of companies

Extremely prevalent in the era of industrial manufacturing within large companies, the openended, permanent employment contract, as a means of regulating labour relations as dictated by labour law, is currently facing two challenges. First, companies are replacing some employment contracts by commercial law contracts, thus avoiding the constraints imposed by labour law. Second, companies are drafting labour standards, particularly codes of conduct, to govern relations with all their workers.

The concomitance of these two apparently contradictory trends is no accident, but rather reflects the changes in companies within modern society, characterised by an independence with respect to State law. In fact, companies organize their economic activity not only according to legal categories, defined by law, but first and foremost according to economic and social imperatives, specifically by establishing their own organisation standards (1.1.) and defining their missions (1.2.).

1.1. *Changes in the organisation of companies*

Given the globalisation of the economy and the resulting increased competition, companies that wish to remain competitive must change their organisation and redefine their boundaries. It appears especially important that they reconsider the line between *making* and *buying,* i.e. distinguishing between what the company itself must produce and what it must acquire from other companies in the market. Of course, companies have always been faced with this decision and have always struck their own balance between these two solutions. Nevertheless, in the current context, there is a strong tendency for the large majority of companies to turn to the market and to outsource all the non strategic activities, establishing therefore a form of hybrid relations within the framework of networks of companies, which transcend the traditional distinction between the organisation and the market (Dupuy and Larre, 1998).

Paradoxically, while the network is created through legal instruments, it still poses a challenge to the law, insofar as the relations established between its members do not fall into traditional legal categories. It was initially thought that this form of company organisation fell somewhere between contract and organisation, between market and hierarchy (Williamson, 1985). In reality, relations within networks, described as *"a social universe of semi-autonomous contractual cultures, governed by organic, co-operative relationships of solidarity and invasive and omnipresent hierarchical domination"* (Gordon, 1985), can not be translated by either of these two legal categories. The links between members of the network of companies are in effect *"more durable than market links, (but) less constrictive than the hierarchical links between a parent company and a subsidiary"* (Mucchielli, 1998, p. 108). In other words,

networks of companies implement *"flexible forms of co-operation that no longer correspond to simple transitory interactions, but which do not yet present the level of co-operation specific to formal organisation"* (Teubner, 1994, p. 271; Joerges, 1991).

Whereas the member companies in a network are subject to a certain degree of control, or at least to a certain interdependence the law in the European Union countries affirms their legal independence. It is not for us to determine whether, and to what degree, the decision by companies to externalise employment by replacing work contracts with commercial law contracts is based on factors related to the theory of organisations or on the benefits stemming from this legal independence of member companies in the network. What is important is that such benefits exist for the employer and that reciprocally, they represent a danger to the workers.

The principle of legal independence of member companies in a network, based on the theory of legal personality, is such that the employees of one company in a network can not engage the legal liability of the network's hub company, even though the latter may make economic decisions that concern the former and, that the employees can not have the unity of this network acknowledged, which results in the break-up of the company and the loss of the protection as many labour law standards are limited to companies of a certain size.

In some cases, of course, labour law in the European Union countries takes into account the specific relations in networks. But the existing regulations have only a limited scope of application. It must first be noted that only certain fields, often marginal, of labour law are concerned, whereas the other fields of labour relations remain subject to the principle of legal independence of the companies within the network. Also, it must be noted that even in fields subject to a departure from principles, not all networks are affected, as the scope of application of regulations is limited both with respect to control measures in the network and to the intensity of these measures. Today, labour law therefore does not completely eliminate the divorce between legal form and economic reality, which emphasises the need in this field for regulation by the company itself, specifically through codes of conduct.

1.2. *The changing missions of companies*

The current changes in companies are not limited solely to their organisation, but can also be noted with respect to their missions. In fact, companies are increasingly showing their desire to go beyond the sphere of economics, specifically by developing codes of conduct which contain standards governing labour relations in all companies of the network. Through this new form of regulation, companies are reinforcing their autonomy with respect to State law and its legal categories. First, this willingness on the part of companies to create standards is somewhat surprising, as they are also trying to organize their activities independently of State law. In reality, however, these two strategies are not contradictory and, on the contrary, can be complementary. In fact, by advocating deregulation, companies are not suggesting that they should not be regulated at all, but rather that they should be regulated differently (Supiot, 1989), and that the balance between the different forms of labour regulation (Jefferey, 1999, p.23) should be redefined, specifically by granting more importance to self-regulation of labour relations by the companies themselves. Accordingly, it is not a matter of companies renouncing all forms of regulation, but rather demanding that they be actively involved in developing the standards governing relations with their workers.

As with the changes in the organisation of labour within companies, the willingness of the latter to create standards that govern work relations within their network can be explained by economic reasons

(Weiser and Zadek, 2000). By complementing State standards in this regard with codes of conduct, the hub company's management is in fact accomplishing an essential task in this form of company organisation, i.e. reconciling the different interests of the parties which affect or which are affected by the network's economic activities. In fact, the different stakeholders are pushing more and more towards corporate social responsibility.

Sometimes, codes of conduct only opt to specify or even to reiterate certain regulations that already apply to companies, as stipulated in mandatory national or supranational texts. But, more and more, codes of conduct grant new rights to workers and represent progress with respect to prevailing legislation, even in the European context. This is because these codes either improve the content of laws, specifically in the fields of anti-discrimination or job security, or because they expand the scope of application of existing laws to the network's entire production and distribution chain.

Nevertheless, even if the labour standards contained in codes of conduct most often result in improved conditions for workers with respect to labour law, they do pose a problem of legitimacy, as companies cannot claim to defend the general good, but rather only specific interests. To take on a certain legitimacy, the network's hub company which adopts the code of conduct must guarantee the participation of all parties affected by the company's activities when developing the standards in the code. In fact, a dialogue between all stakeholders could contribute to changing relationships within the company and particularly enable better implementation of codes of conduct.

2. Implementation of codes of conduct within networks of companies

The adoption, by companies, of corporate codes of conduct is supposed to provide their workers with a certain degree of protection. However, these standards, whether imposed by public authorities or negotiated between social partners, differ from labour law in that they are selective and above all voluntary. First, only the companies which want to adopt codes are concerned. Second, the company's commitments in its code of conduct are often limited to respecting social standards that are likely to have a major media impact, such as child labour, while neglecting fundamental social rights, such as freedom of association and collective bargaining (Hepple, 1999). One could also note that many codes of conduct are not very transparent about the conditions for their drafting and application. This relative opacity can be dangerous, as in the absence of effective methods of inspection and sanction, respect for the commitments made by the company in its code of conduct is not always guaranteed, and, therefore, risks not only failing to improve the workers' situation, but also slowing the intervention of public authorities in regulating labour relations within the network of companies, the latter apparently being self-regulated in a manner satisfactory to the company itself.

Accordingly, steps should be taken to ensure that codes of conduct do not replace, but rather complement, the standards developed by States, the European Union or the social partners (Weiss, 2001). In no event may the codes of conduct weaken the guarantees granted to workers under labour law. They can only contribute to strengthening them, which implies that the principle of favour, well known to jurists in labour law, when defining the role of collective bargaining and the law (Daubler, 1996; Daubler, 1998, p. 149; Rade, 2000; Supiot, 1994, p. 137), is respected.

Instead of setting the standards stemming from labour law against those contained in codes of conduct, it should be shown that these two types of standards must, and can, complement each other, even if each one retains its own characteristics. The first distinction between codes of conduct and labour law standards concerns their drafting, which involves new players and is done according to new procedures

(2.1.). The second distinction stems from the first and involves the application of these standards, in that how the standards are developed determines their legal standing and, therefore, their enforceability (2.2.).

2.1. *Changes in the drafting of labour standards*

The emergence of labour law in the European Union countries toward the end of the 19th century was the result of an observed economic imbalance between company owners and their workers, which common contract law, founded on the principle of the equality of parties, was unable to regulate (Giugni, 1986); indeed, it risked exacerbating it by recognising the power of company owners, without granting counterbalancing protection to the workers. Accordingly, a review of labour law standards, as advocated by the supporters of deregulation, should in no case result in an easing of labour relations regulations, but simply in a different form of regulation, i.e. self-regulation by the company (Supiot, 1989).

One should not condemn self-regulation by companies, which has always existed and even historically predates labour law. There can be no denial of the need to take into account the specifics of each company in governing its labour relations, something that is impossible to guarantee with the implementation of a general set of rules, applicable to all companies within a country or a sector. Conversely, it appears critical that this self-regulation pursue not only the interests of the company's CEO but those of all parties concerned and specifically the workers, which implies their participation in developing labour standards within the company. The participation of workers or their representatives thus confers on these standards both an ethical legitimacy and a more significant legal standing.

As drafting codes of conduct, which govern labour relations within networks of companies, is voluntary, their adoption by the company necessarily implies the agreement of the company's CEO. In most cases, the latter is him/herself the source of this initiative, either to align his/her personal ethical principles with his/her behavior in the business world (Blanchard and O'Connor, 1997; Petry, 2001) or to strengthen the economic performance of the company. This dominant role of the company's CEO in the process leading to the adoption of the code of conduct does not mean, however, that the latter always takes the form of a unilateral act. In fact, if this seems to be the case with the majority of codes of conduct adopted by networks of companies having an American culture, the texts developed by hub companies having their head office in a country in continental Europe guarantee in principle a fairly significant input from the workers.

This participation is first and foremost a requirement of democracy, which is no longer limited solely to the political arena, but today concerns the whole of society, and specifically the companies of which the workers must be citizens (Auroux, 1981, p. 26; Supiot, 1998). If codes are unilateral decisions of the company's CEO, the latter who is *"directly implicated as a potential justiciable, is transformed into legislator, policeman and judge, without regard for the most basic separation of powers"* (Delmas-Marty, 1998, p. 73). Apart from a financial participation in the company's profits, which is becoming prevalent in member states of the European Union (Alaimo, 1996), it is the participation of workers or their representatives in economic decisions which is therefore required. Even if this does not translate into allocating workers a certain number of seats on the governing boards of the company, as in the case of German co-management (Daubler, 1976), this participation makes it possible to exercise a certain infiuence on the decisions taken by the company's CEO, either by way of informing and consulting workers' representatives or the collective bargaining of labour standards (ILO, 1998).

The participation of workers also appears increasingly as an economic necessity, which enables the company not only to attract, maintain and above all motivate qualified workers, but also to protect its image among its external stakeholders. The public, like the workers, are likely to judge the sincerity of the company's social commitment based on the drafting of the code of conduct, such that a text adopted unilaterally runs a high risk of being considered solely as a marketing tool and of not being respected by the company's own workers (Dion, 1995; Pruzan, 1998).

The participation of workers in developing a code of conduct, which governs labour relations within the network of companies, is also necessary for legal reasons. The labour laws within the Europe Union countries grant significant importance to collective bargaining in determining working conditions, which means that codes of conduct, which govern labour relations within groups of companies, can take the form of collective agreements. Clearly, the conclusion of a collective agreement signed with trade unions poses legal problems within the context of a network of companies, specifically because the principle of autonomy of each company in the network prohibits negotiation solely with the hub company, which could not legally bind the other companies. Practice shows, however, that this difficulty can be circumvented, for example, by negotiating codes of conduct with social partners at the sector level, which has specifically been the case in the European textile industry (European Confederation of the Footwear Industry, 1995; European Confederation of Footwear Industry, 1996; Euratex, 1997, Confederation of National Associations of Tanners and Dressers of the European Community, 2000).

Even if the employer refuses to open collective bargaining on the code of conduct that it wishes to adopt within the network, the labour law in the European Union countries requires it to respect certain procedures guaranteeing participation by the workers. First, one should note the right to information and consultation, which covers major social and economic decisions by the employer, and which must therefore enable the workers' representatives to give their opinion on the project and the content of the code of conduct (Weiss, 2000). Another way for workers to participate in the drafting of corporate codes of conduct consists in guaranteeing them representation on the company's governing boards, as in the case in major German corporations (Streeck and Kluge, 1999; Streeck, 2000; Daubler, 1976), in the new European company (Alaimo, 1998, Jacot and Duigou, 2000) and in other corporations which are developing employee shareholding.

Whatever its form, the participation of workers in drafting codes of conduct reinforces not only the legitimacy, but also the efficiency of these texts. The workers' representatives can participate both in controlling the implementation of the codes of conduct and in sanctioning the companies which do not respect the principles contained in the code.

2.2. *Changes in the application of labour standards*

It is not enough for a corporation to adopt a code of conduct which sets out labour standards applicable to all companies in the network; these standards must also be effectively applied. Otherwise, the code of conduct is nothing more than a marketing instrument, which must be condemned not only from an ethical standpoint, but which also presents a certain danger for the company, insofar as it becomes more vulnerable to criticisms by the media and non-governmental organisations, which take particular interest in companies that formalise their social commitment. The evident major shortage of information is regrettable, specifically among workers in networks of companies which have a code of conduct.

A perfect understanding of the code by the individuals concerned is an indispensable condition to its application, which is currently at the heart of debates on a company's social responsibility. It must be

estimated (Gordon, 1999) that the problems of implementation experienced by State law (Farjat, 1982) are essentially the same, specifically in the area of labour relations, as stressed by reports of the ILO (ILO, 2000; ILO, 2001), which show violations of fundamental social rights. However, it should be considered that the means used to overcome these difficulties are not the same in both cases. Whereas State law has available an army of administrative inspectors, and especially legitimate jurisdictions able to sanction violations, the intervention of these powers in the area of codes of conduct is problematic. Accordingly, the question must be asked as to how these codes of conduct can be effectively monitored (2.2.1.) and sanctioned (2.2.2.).

2.2.1. *Monitoring codes of conduct in groups of Companies*

In the absence of a monitoring procedure suited to the characteristics of the codes of conduct in networks of companies, these texts must be considered not only as marketing instruments that have no concrete effect on workers' situations, but even as dangerous instruments, insofar as they can slow down, or even prevent the development of compulsory regulation of labour relations within networks of companies by labour law. Nevertheless, the systems for monitoring codes of conduct were for a long time the *weak link* in numerous codes, or even sometimes a totally absent link (ILO, 1998b). According to an OECD study, 41% of codes of conduct adopted by individual companies make no reference to procedures for monitoring the code (OECD, 1998).

Initially, the majority of hub companies, after having adopted a code of conduct, only sent it to the management boards of the other companies in the network, stipulating that it was a central component in their commercial relationship, and that non respect of the code could lead to sanctions. Sometimes, member companies even had to sign a contract agreeing to abide by the principles contained in the code. Fairly quickly, however, the limitations of such a control system were identified, as it was based on the co-operation of member companies, whereas they were not always convinced of the interest of acknowledging their social responsibility. Accordingly, a more hierarchical approach was needed, based on inspection visits on site.

The credibility of how codes of conduct are monitored was then assessed with respect to the independence of its players, and overly close links between the inspectors and the companies concerned had to be avoided to limit the risks of complacency. Nonetheless, numerous companies preferred to retain a certain authority over the inspection procedure by entrusting it to their own collaborators or specialised audit committees, which were basically under their economic influence. It would be better to entrust monitoring of the application of the codes of conduct to more independent organisations such as NGOs active in the field of human rights, or to employee unions.

More generally, it seems necessary to bring codes of conduct out of the private sphere. Since the code of conduct is not adopted in the sole interest of the managers of the hub company, but in response to expectations formulated by all the stakeholders, the results of the inspection should be published, as a sign of the sincerity of the corporation's ethical commitment, not only to the shareholders and consumers, but also to those companies of the network unlikely to spontaneously respect the code of conduct. In this regard, one should welcome the increasing number of spontaneously published social reports, even if there still remains much to be done concerning the credibility of these reports (Doane, 2000), but especially the law of the new economic regulations in France which requires French

companies, starting in 2003, to publish an annual report *"on the manner in which the corporation takes into account the social and environmental consequences of its activities".*[1]

Another effective means of reinforcing the legitimacy of the system of monitoring codes of conduct consists in organising a legal framework, that will be developed by the public authorities. By definition, the private and voluntary nature of the codes is in opposition to a pure and simple transposition of the control procedures used to ensure respect for traditional labour standards, be they public or private. Rather, the situation requires thinking up new types of inspection, based on defining new roles for the private actors and public authorities and on the theory of reflexive law (Hess, 2001). At this point, we should mention the *Open Labour Standards* system developed by Charles Sabel (Sabel, O'Rourke and Fung, 1999), which requires public authorities to organise a competition between the various types of monitoring of codes of conduct. Furthermore, the public authorities, whether at the country, European Union or international level, can play a major role, specifically in training and monitoring inspectors.

2.2.2. *Binding effect of codes of conduct within networks of companies*

Lastly, it is necessary to question the legal value of codes of conduct adopted by networks of companies and the legal liability in the case of violation of this text. In other words, it must be determined whether a company's social responsibility can become a liability in the legal sense. In reality, the question of sanctions in the case of violation of a code of conduct concerns two distinct scenarios. In the first scenario, the provisions of the code of conduct are violated either by a member company of the group or by an employee, and it is the hub company that wishes to engage the liability of its co-contractors. This liability exists and implies totally classic application of the principles of either contract law or labour law.

However, a second scenario must also be contemplated in which a trade union or a NGO tries to engage the liability of the network's hub company because of the non-respect of the code in another company of the network. This situation requires a more in-depth reflection on the legal value of these labour standards, developed by private actors, and which are outside of the procedures covered by State law. The doctrine often considers codes of conduct as falling into the category of *soft law,* and attributes only weak legal effect to them. But this analysis can be renewed in order to try to find means that make it possible to force the network's hub company to respect its commitments and engage its legal liability before a State judge.

The surest way to guarantee effective application of the code of conduct governing labour relations within a network of companies consists in resorting to texts that were not drafted within the company, but at a higher level, i.e. that of the sector, as is the case of the various codes of conduct negotiated between social partners in the European Union, or at the trade union or NGO level, which can eventually attribute a social label. This solution makes it possible to confer greater legitimacy on the code and guarantee better participation by the workers. This solution is also useful in implementing an effective, independent system of monitoring and can contribute to strengthening the legal effect of the code of conduct and facilitate the engagement of liability in cases of violation of the code.

But, even if the violation concerns a code of conduct, which was drafted by the hub company itself, and accordingly is a purely unilateral commitment, one can adopt an economic approach to these codes and estimate that *" the publicity given to these measures for a commercial purpose involves legal obligations pursuant to the general provisions that govern the company's statements, advertising and competition"*

[1] Section 116 of Law 2001-420 of May 15, 2001 on the new economic regulations.

(Diller, 1999). As it has been decided by the Supreme Court of California in the Nike case (Kasky v. Nike, May 2002), it is perfectly possible to contemplate an action against a hub company which fails to respect its code of conduct by basing it on misleading advertising. As the legal framework in this field is quite similar,[2] it seems as if the same applies in the European Union countries.

These new sanctions for violation of the code of conduct are not based on the violation of fundamental social standards, but on the violation of its obligation to inform consumers, which may appear cynical. The laws of the European Union countries appears to better protect the rights of (Europeans) consumers than the basic rights of workers (in developing countries). However, a pragmatic approach should be adopted so as to explore all of the possible avenues that can be used to require hub companies to respect the commitments they make in their codes of conduct, the objective being to enable better protection of workers' rights within networks of companies.

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[2] Directive 84/450 of September 10, 1984, amended by Directive 97/55 of October 6, 1997.

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